FILE COPY

Office - Supreme Court, U. S
FILED
MAY 7 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

NO. [redacted] 13

UNITED GAS PUBLIC SERVICE COMPANY,
Appellant

versus

STATE OF TEXAS, ET AL.,
Appellees

APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLEES' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

WILLIAM MCCRAW,
Attorney General of Texas

ALFRED M. SCOTT,
Assistant Attorney General

EDWARD H. LANGE,
Laredo, Texas

Attorneys for Appellees,
State of Texas, et al.

ELLIOTT PRINTING CO.—*Austin*

INDEX TO PARTS

		Pages
DIVISION 1:	This Court should look beyond the mere form of the Texas Supreme Court's order refusing writ of error and, taking judicial knowledge of the State law and decisions of Texas, attach thereto the legal consequences, which are an affirmance on the merits	1-11
DIVISION 2:	Under the State law of Texas, as reflected by its statutes and the decisions of its highest Courts, the refusal of a writ of error by the State Supreme Court constitutes an active exercise of jurisdiction and an affirmance on the merits	11-19
Signature and Conclusion		19

INDEX TO AUTHORITIES

DECISIONS

Abie State Bank vs. Bryan, 282 U. S. 765, 778, 75 L. Ed. 690	8
Bain Peanut Co. of Texas vs. Pinson & Guyger, 282 U. S. 811, 75 L. Ed. 726; 282 U. S. 499, 75 L. Ed. 482	6
Berea College vs. Kentucky, 211 U. S. 45, 56, 53 L. Ed. 81	8
City of Houston vs. City of Palestine, 114 Tex. 306	17, 18
Edgar vs. Stanolind Oil Co., et al, 90 S. W. (2d) 656	18, 19
Gammel Statesman Publishing Co. vs. Ben C. Jones & Co., 206 S. W. 931	13, 14, 15, 16, 17
Gatz vs. City of Kerrville, 121 Tex. 92	16
Hanley vs. Donoghue, 116 U. S. 1, 6, 29 L. Ed. 535	8

INDEX TO AUTHORITIES (Continued)

	Pages
I. & G. N. Co. vs. Anderson County, 174 S. W. 305	17
Norfolk & Suburban Turnpike Co. vs. Virginia, 225 U. S. 264, 267-269, 56 L. Ed. 1082	2, 4, 7
San Antonio & Aransas Pass Ry. Co. vs. Blair, 108 Tex. 434, 437-441	16

STATUTES.

Article 1728	12, 13
Article 1821	12
U. S. C. Title 28, §344a (§237 Judicial Code)	3

TEXTS.

Robertson & Kirkham, "Jurisdiction of the Supreme Court of the United States", Secs. 44, 281 and 361, note 68, page 747	10, 11
Sec. 48	15
Sec. 49	14, 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

NO. 807

UNITED GAS PUBLIC SERVICE COMPANY,
Appellant

versus

STATE OF TEXAS, ET AL.,
Appellees

APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLEES' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

To the Honorable Supreme Court of the United States:

Believing that it will lighten the labors of this Court, we reply briefly to some of the contentions advanced by Appellant.

I.

In reply to the contention that, in deciding whether the appeal has been taken from "the highest court of a State in which a decision of the suit could be had,"

this Court will limit itself strictly to the form of the order of the Supreme Court of Texas in refusing the writ of error, and will not look beyond, to the legal effect attached to that refusal by the State law of Texas:

In the first division of its brief, Appellant contends that the case of *Norfolk & Suburban Turnpike Co. vs. Virginia*, 225 U. S. 264, 267-269, 56 L. Ed. 1082, and other cases, applying the doctrine of that case, cited in Appellees' original brief on pages 4-5, establish the rule that in order to sustain an appeal from the Supreme Court of Texas, this Court would require that the Supreme Court of Texas, in addition to entering its usual order refusing the application for writ of error, go further and recite that it has actually exercised its appellate jurisdiction over the case and has considered and passed upon the merits, and order explicitly in the face of the record that the judgment of the Court of Civil Appeals shall be and is thereby affirmed. It is to be borne in mind that even if the Supreme Court of Texas had done those things in this case, it would not have added one cubit to the stature of the order which it actually did enter; for we have already shown, and will demonstrate even more plainly herein, that when the Supreme Court of Texas enters an order refusing a writ of error in a case properly appealable to it by that exclusive mode of appeal, the State law of Texas attaches to that order the necessary legal consequence that the Supreme Court of Texas has thereby actually exercised its appellate jurisdiction over the cause and has affirmed same upon its merits in such way that both the judgment and the opinion of the Court of Civil

Appeals are thereby adopted and made those of the Supreme Court of Texas itself; and that, although a portion of the record is thereupon remitted to the Court of Civil Appeals, whence the mandate lawfully issues for the enforcement of the judgment, that mandate is in reality a process issued through the lawful agency of the Court of Civil Appeals but for the enforcement of a judgment of the Supreme Court of Texas itself; and that the last mentioned Court, in all situations where such becomes necessary, will intervene with its own appropriate process for the enforcement of such judgment as its own.

Section 237 of the Judicial Code (U.S.C, Title 28, Section 344a) expressly and mandatorily requires that an appeal from a State court, in order to be sustainable in this Court, must be prosecuted from "the highest court of a State in which a decision of the suit could be had." Thus, the State court from whence the appeal is to be prosecuted is definitively, exclusively and mandatorily fixed and identified. As we expected, Appellant has made the most of the contention that the practice of appealing from the Courts of Civil Appeals in these circumstances is correct because it has been countenanced by this Court inadvertently as proper for a great many years, and in a great many cases. The argument is that a practice which originally violated the mandatory requirements of the Federal statute governing this Court's jurisdiction has been sanctified into propriety by long usage. But the Federal law cannot thus be amended by ancient custom. The requirement of the Federal statute is plain and inexorable that the appeal must be prosecuted from the highest court of a State in

which a decision of the suit could be had; and if the condition is not fulfilled then this Court has no jurisdiction. The condition cannot be fulfilled by any *presumption* that the appeal has come from the correct court, when the actual fact is shown to be that it has not come from such court at all, but has come from an intermediate appellate court whose judgment has been affirmed on its merits by the action of "the highest court of a State in which a decision of the suit could be had."

No mere failure of the Supreme Court of Texas to write into its order, or into an opinion, expressly those things which the law of the State attaches as a necessary legal consequence of its refusal of the writ of error in this case (whether such failure was attributable to any fault of Appellant or not) can serve to amend, or waive for Appellees, the mandatory provision of the Federal law governing this Court's jurisdiction, as to which court the appeal is to come from. If the appeal has not been prosecuted from that court as matter of actuality (and, hence, if the Appellant has failed to discharge its duty of presenting to this Court a record which affirmatively reflects that the appeal has been taken from such court; and more especially, if it be affirmatively shown either by Appellant or Appellee or both that the appeal has not been prosecuted from that court) then under the rule announced in *Norfolk & Suburban Turnpike Co. vs. Virginia, supra,* and other decisions of this court following and applying that rule, the penalty which the Appellant must suffer is the *dismissal of its appeal for want of plainly demonstrated jurisdiction.*

This Honorable Court has always guarded its jurisdiction with jealousy, and instead of indulging presumptions in favor of, has actually indulged all presumptions against, its jurisdiction until such be plainly demonstrated *by appellant*. If, as Appellant urges, this is a mere matter of the present record *failing to reveal* that the Supreme Court of Texas was the proper court from which to appeal, then it does not follow that the Court of Civil Appeals was the proper Court, nor that this Court is justified in *presuming* that it was. This is no matter where *presumption* can take the place of *actuality*. The jurisdiction depends upon a condition, and if Appellant fails to show that the condition is met, or if it be affirmatively shown by anyone that it has not been met, in the one case jurisdiction has not been shown, and in the other there is no jurisdiction. Yet that is exactly what the Appellant is asking this Court to do. If, as Appellant contends, in order that an appeal from the Supreme Court of Texas may be sustainable here it is necessary for anyone to present a record affirmatively reflecting that the Supreme Court of Texas had actually *exercised jurisdiction and affirmed* the cause upon the merits, then that duty plainly devolved upon Appellant and not upon Appellees. Under Appellant's own contention, therefore, the duty devolved upon it to request the Supreme Court of Texas, if necessary, to go further than merely entering an order refusing its application, and to recite affirmatively the actual exercise of jurisdiction and affirmance upon the merits.

Notwithstanding the fact that Appellees were under no duty to do so, they have, in their original motion

and argument, offered that if this Court is in doubt as to what legal consequences attach under the State law of Texas to the refusal of application for writ of error by the Supreme Court of Texas, that they, Appellees, will themselves file a motion with the Supreme Court of Texas asking it, in response to the invitation of this Court, to make and enter even yet its supplemental opinion and order meeting the requirements which Appellant says must be met in order to show that the case is properly appealable from the Supreme Court of Texas. To this offer, Appellant replies that it is not competent for the record to be augmented by any supplemental opinion or order of the Supreme Court of Texas. (See Appellant's brief, page 22, where Appellant cites authorities claimed to support the proposition that this Court will not permit the making and filing as a part of the record in this Court supplemental opinions or orders of the State court clarifying the State law and the State court's judgment and aiding this Court in deciding whether it has jurisdiction.) Our reply to that argument is a citation to the case of *Bain Peanut Co. of Texas vs. Pinson and Guyger*, 282 U. S. 811, 75 L. Ed. 726; 282 U. S. 499, 75 L. Ed. 482, where an appeal to this Court was first dismissed for apparent want of jurisdiction, and then with this Court's express approval the Appellant was permitted to, and did, obtain the entry of a supplemental clarifying opinion by the Supreme Court of Texas, after the filing of which, in this Court, the appeal was reinstated and disposed of upon its merits.

Our understanding is that this Court has always reserved unto itself the privilege of taking whatever

steps are necessary and appropriate to inquire into and determine the facts and law upon which its jurisdiction depends.

Appellant urges that if the rule for which we contend were established, suitors appellant would have no fixed and definite standard, guide or test by which to determine from which State court they should prosecute their appeals. We submit that this argument is utterly unfounded. Mr. Chief Justice White laid down plainly the principle and test, upon which that question turns, in *Norfolk & Suburban Turnpike Co. vs. Virginia, supra.* The test is that if under the law of the State whence the appeal comes the refusal of writ of error by the highest State court constitutes an actual exercise of jurisdiction and an affirmance of the judgment of the intermediate appellate court upon its merits, then the appeal should be prosecuted from the highest State court; but if such order, under the State law, amounts merely to a refusal to exercise any jurisdiction at all, then the appeal should be prosecuted from the intermediate appellate court. No test could be plainer, more definite, certain, fixed or unmistakable. This Court has never shrunk from the duty of ascertaining, where necessary, what the law of a particular State is; even in cases where the question was attended with difficulty and uncertainty, as it is *not* here. Appellant has at its peril failed to apply the test properly in this case, though it is presumed to know the law of its own State.

The matter resolves itself, therefore, only into a question of *what sources* this Court will look to in

order to determine the effect under the State law of a refusal of writ of error by the highest State court. Will this Court, as Appellant contends, look only narrowly and restrictively to the mere words and form of the order of the Supreme Court of Texas refusing writ of error, and close its eyes to the plainly declared and established law of the State of Texas as evidenced in the statutes and decisions of the highest Court of that State? Or will this Court do what it has always done, and declared that it will continue to do, namely, take judicial notice and knowledge of the law of the State of Texas, and attach the necessary legal consequences thereof to the Texas Supreme Court's order refusing the writ of error? This Court has many times said that in appeals coming here from State courts it will take judicial knowledge of the law of the State as evidenced by its statutes and the decisions of its highest courts where properly called to this Court's attention. *Hanley vs. Donoghue*, 116 U. S. 1, 6, 29 L. Ed. 535; *Berea College vs. Kentucky*, 211 U. S. 45, 56, 53 L. Ed. 81; *Abie State Bank vs. Bryan*, 282 U. S. 765, 778, 75 L. Ed. 690. Yet Appellant asks that this Court repudiate and refuse to apply that rule, restricting its vision and knowledge solely to the strict form of words appearing in the order of the Supreme Court of Texas refusing writ of error, and decline to exercise its knowledge of what the State law of Texas is and what legal effects and consequences of that law necessarily attach to the action of the Supreme Court of Texas in refusing writ of error.

But, Appellant urges, if it had prosecuted its appeal from the Supreme Court of Texas instead of

the Court of Civil Appeals, it would have been compelled to go up only on that portion of the record which remained in the Supreme Court of Texas, after that Court had refused writ of error and remitted a portion of the record back to the Court of Civil Appeals; and it is urged that on the face of that portion of the record there would have been nothing to reflect affirmatively that the Supreme Court of Texas in refusing its writ of error had exercised its appellate jurisdiction and affirmed the case upon its merits; hence, it is urged, its appeal would have been dismissed for want of jurisdiction. And, it is urged further, in order to protect itself against the present motion it would have been compelled to prosecute a double appeal, one from the Supreme Court of Texas and one from the Court of Civil Appeals. It is further urged that it could not properly appeal from the Supreme Court of Texas, because the Court of Civil Appeals is "the court possessed of the record," and that Appellant and this Court would have had no way of bringing up that portion of the record in possession of the Court of Civil Appeals; and, tied in with this contention, is the astounding proposition that this Court would have no way of making its judgment binding upon, and enforcible against, the Court of Civil Appeals.

In view of what Appellant has done in this appeal, we do not understand how it can consistently make any of such contentions. At page 2 of its brief, Appellant states that after the Supreme Court of Texas had finally refused its application for writ of error "the record was returned to the Court of Civil Appeals." If by this it is meant to assert that the entire

record was remitted below, the statement must be corrected. Only a portion of the record which was before the Supreme Court of Texas was under the law required to be, and was actually, remitted to the lower court. A substantial portion thereof, as is reflected by Appellant's brief elsewhere, (pages 10-11) and as reflected by Appellant's praecipe to the Clerk of the Supreme Court of Texas[1], remained in the last mentioned court. That portion consisted of Appellant's application for writ of error, these Appellees' reply thereto, the orders of the Court of Civil Appeals transmitted to the Supreme Court with the record when the application was filed, the motion for rehearing of such application, and the orders of the Supreme Court refusing such application and overruling the motion for rehearing thereof. In the very nature of things Appellant was compelled to, and did, in this appeal direct separate praecipes to the Clerks of the Supreme Court of Texas and of the Court of Civil Appeals[2] in order to bring up the whole record necessary to this appeal. The same procedural steps identically would have been necessary, and would have been equally efficacious, if the appeal had been taken from the Supreme Court of Texas instead of the Court of Civil Appeals. In no event, therefore, can it truthfully be said that the Court of Civil Appeals is the "court possessed of the record" any more than the Supreme Court of Texas. The difference, if any, is only quantitative. *Robertson and Kirkham ("Jurisdiction of the Supreme Court of the United*

---

[1]See Appendix A, pages 25-27, Appellees' original brief in support of its motion to dismiss herein.

[2]See reference in foot note 1 above.

States," Sections 44, 281, *and* 361, *note* 68, *page* 747, *and cases cited*) show that in several decisions of this Court it is amply established that "the court possessed of the record" is not necessarily the court from whence appeal should be prosecuted. There is a variety of situations, which have arisen and may arise, where the record or a portion thereof necessary to a review of the case by this Court might be in possion of courts, officials, or persons other than "the highest court of a State in which a decision of the suit could be had," and in every such case this Court has reserved to itself, and has exercised, all necessary and appropriate processes and means to bring before it a complete record necessary to such a review.

If an appeal had been prosecuted from the Supreme Court of Texas in this case, and this Court had rendered its judgment in such appeal, can it be doubted that such judgment would be binding upon both the Supreme Court of Texas and the Court of Civil Appeals whose judgment and opinion the Supreme Court of Texas affirmed?

II.

In reply to Appellant's assertion that under the State law of Texas the refusal of writ of error by the Supreme Court of Texas does not constitute an actual exercise of appellate jurisdiction and an affirmance upon the merits.

Appellant asserts that when an application for writ of error is duly filed with the Supreme Court of Texas it is *"discretionary"* with that Court whether it will review the case upon its merits or not. We

take issue with that contention most vehemently. We assert, and will undertake hereinafter to demonstrate conclusively, that in this case Appellant not only had the privilege of, but has actually asserted its right to and has received, *as of right*, a review of its case upon its merits by the Supreme Court of Texas. Appellant's case is not one of those made final in the Court of Civil Appeals by Article 1821, R.C.S. Texas 1925,[3] and Appellant has so asserted to the Supreme Court of Texas in its application for writ of error found in this record. On the contrary, as was also affirmatively asserted by Appellant in its said application for writ of error, its case falls squarely within the provisions of subdivisions 3, 5 and 6 of Article 1728, R.C.S. Texas 1925 as amended in 1927,[4] which Article and subdivisions thereof Appellant likewise expressly invoked in its application for writ of error filed with the Supreme Court of Texas. Said

---

[3]Article 1821. Judgment conclusive on law. The judgments of the Courts of Civil Appeals shall be conclusive on the law and facts, nor shall a writ of error be allowed thereto from Supreme Court in the following cases to wit:

1. Any civil case appealed from the County Court or from a District Court, when, under the Constitution, a County Court would have had original or appellate jurisdiction to try it, except in probate matters, and in cases involving the Revenue Laws of the State or the validity or construction of a Statute, or cases involving conflicts between decisions of the Courts of Civil Appeals or between a decision of a Court of Civil Appeals and a decision of the Supreme Court.
2. All cases of slander.
3. All cases of divorce.
4. All cases of contested elections of every character other than for State officers, except where the validity of a Statute is questioned by the decision.
5. In all appeals from interlocutory orders appointing receivers of trustees, or such other interlocutory appeals as may be allowed by law.
6. In all other cases as to law and facts, except where appellate jurisdiction is given to the Supreme Court, and not made final in said Court of Civil Appeals. (As amended Acts 1929, 41st Leg., p. 68, ch. 33, §1.)

[4]See Appendix E, pages 43-45, Appellees' original brief in support of its motion to dismiss herein.

Article 1728 expressly confers upon dissatisfied litigants the right of filing with the Supreme Court of Texas their application for writ of error and having the same considered by that Court, *as of right and upon the merits,* in every case falling within any of the classes enumerated in that Article.

Under the plain requirements of that Article, and under the holding in the *Gammel Statesman* case, it is indisputable that Appellant's appeal was reviewed as of right and affirmed upon the merits by the Supreme Court of Texas even though that Court refused writ of error rather than granting it. The reason that statute enjoins upon the Supreme Court of Texas the mandatory duty to take the "short cut" of refusing the writ of error where that Court approves the judgment and opinion of the Court of Civil Appeals is to avoid the unnecessary work of formally granting the writ, transferring the cause from the application docket to the cause docket, in most cases receiving and considering additional briefs, hearing oral argument upon formal submission, doing further legal research, and then terminating the whole useless procedure by merely entering a formal judgment expressly affirming the judgment of the Court of Civil Appeals, and writing an additional opinion paraphrasing the opinion of the Court of Civil Appeals when, upon the petition for writ of error, and upon the record, as presented, the Supreme Court of Texas is of opinion without further briefs, oral argument and legal research that the judgment and opinion of the Court of Civil Appeals are plainly correct; and when under the law the necessary legal effect of a refusal of the writ of error is to place the stamp of

approval and affirmance of the Supreme Court of Texas upon the judgment and opinion of the Court of Civil Appeals. In actual practice, therefore, it will be seen that the Supreme Court of Texas *grants* the writ of error only where upon consideration of the petition therefor and the record, that Court is of opinion that there is error, or probable error, in the *judgment* of the Court of Civil Appeals, requiring reversal or modification. In that case the writ is granted only for convenience of the Supreme Court of Texas in order to enable it to receive the benefit of the additional procedure above outlined, where it seems that such is necessary to enable that Court to rectify palpable error or probable error in the judgment of the Court of Civil Appeals. Where, upon the face of the petition and record, the Supreme Court of Texas is plainly of opinion that the judgment and opinion below are correct, without the need of additional briefs, argument, and research, then it would be vain to go through the additional formal procedure when the same result of affirmance can be reached, *and is required by the statute to be reached*, by a refusal of the writ. Under the Gammel decision, this is as truly an affirmance as in the case of a formally granted writ and a new judgment and opinion. This serves to dispel the illusion of anomaly which the Appellant attempts to create in this Court's mind as to how there can be an affirmance when a writ of error is refused.

This case, therefore, falls squarely within the class of cases referred to by *Robertson and Kirkham. "Jurisdiction of the Supreme Court of the United States", Section* 49, and is not within that class of cases wherein the appellant is entitled to a review upon the merits only

at the *discretion* of the highest court of the State, which line of cases is referred to and cited in *Section* 48 of *Robertson and Kirkham* text. Those authors, in *Section* 49 of their work, make it quite plain that where, as is the case here, an appellant has enjoyed a review *on the merits* by the Supreme Court of Texas *as of right*, the appeal should be prosecuted from the Supreme Court of Texas; not from the intermediate appellate court, as is the case where the review is only discretionary with the highest court of the State.

In the case of *Gammel Statesman Publishing Co. vs. Ben C. Jones & Co.*, 206 S. W. 931, how and where did the Supreme Court of Texas derive its power and authority to enforce, as a judgment of its own, after first refusal of writ of error, the judgment first rendered by the Court of Civil Appeals, if the Supreme Court of Texas was not actually exercising its appellate jurisdiction over the cause and affirming it upon its merits (as it expressly held it had done) by the refusal of the first application for writ of error? Listen again to what the Supreme Court of Texas said in the Gammel decision:

> "The motion in the case before us was filed and acted upon by the Court of Civil Appeals after the Supreme Court had *refused* a writ of error in said cause, *and by such action affirmed the original judgment of the Court of Civil Appeals and that of the trial court.*"

Although Appellant admits at pages 23-25 of its brief, that the *Gammel Statesman* case fully supports our contention herein as to the State law, yet it contends that the force of that decision, as an authority,

is weakened by the fact that it involved *unusual circumstances.*

Elsewhere (pages 5, 14-16) Appellant cites *San Antonio & Aransas Pass Ry. Co. vs. Blair,* 108 Tex. 434, 437-441, and *Gatz vs. City of Kerrville,* 121 Tex. 92, as holding contrary to, and in effect overruling, the Gammel Statesman case; and even contends that such cases hold that the refusal of the writ of error by the Supreme Court of Texas is a refusal to exercise any jurisdiction, and not the exercise of jurisdiction and affirmance upon the merits. Neither of the cases holds any such thing. The *Gatz* case does not purport to overrule the *Gammel Statesman* case. The *San Antonio & Aransas Pass* case was decided approximately eighteen months before the *Gammel Statesman Publishing* case. It involved simply the question of whether the 1917 Statute, authorizing the Supreme Court to designate three justices of the Courts of Civil Appeals to pass upon applications for writs of error pending in the Supreme Court, was unconstitutional. The majority held it constitutional upon the view that it was not expressly forbidden by the State Constitution, and was, therefore, authorized.

Neither the *San Antonio & Aransas Pass* case nor the case of *Gatz vs. City of Kerrville* in any way supports the proposition to which Appellant cites them, at pages 5, 14-16 of its brief, nor in any way militates against the authority of the *Gammel Statesman* case. What the *S. A. & A. P.* and *Gatz* cases hold is, not that the Supreme Court of Texas is not actually exercising its jurisdiction upon the merits in passing upon applications for writs of error, but

that the State Constitution not only does not forbid but expressly authorizes such jurisdiction to be exercised as an aid to that Court by judicial officers or agencies other than the judges of the court proper.

In its footnote 10 at the bottom of pages 24, 25 and 26 of its brief, Appellant cites certain cases which it states support its contention that the Bench and Bar of Texas have for over twenty years regarded the *Gammel Statesman* case as being restricted narrowly to the unusual facts there involved and not as deciding any principle of general application. No case cited supports any such limitation of that case as an authority. *I. & G. N. Co. vs. Anderson County*, 174 S. W. 305, writ refused by the Supreme Court of Texas, affirmed by this Court 246 U. S. 424, and the related case of *City of Houston vs. City of Palestine*, 114 Tex. 306, are not in disagreement with the *Gammel Statesman* case. The Supreme Court of Texas very properly held, 114 Texas 306, that the Court of Civil Appeals had jurisdiction to restrain by an original writ of prohibition the interference by a District Court with the previous judgment of the Court of Civil Appeals, which had been affirmed on its merits by the denial of a writ of error by the Supreme Court of Texas. This was in accordance with the above mentioned general rule in Texas that process for the enforcement of a judgment of the Court of Civil Appeals issues out of that Court even though the judgment has been affirmed by the refusal of a writ of error by the Supreme Court of Texas; and in this particular case such general rule and principle was further reinforced by explicit provisions of both the State Constitution and statutes authoriz-

ing the Court of Civil Appeals to issue the original common law writ of prohibition to prevent interference with its own judgments. The parties against whom the writ of prohibition was issued then attempted to *appeal* from the action of the Court of Civil Appeals in granting the writ of prohibition by filing their application for writ of error from such judgment with the Supreme Court of Texas. The last mentioned Court very properly held that it had no power to exercise *appellate* jurisdiction over the action of the Court of Civil Appeals in granting the writ of prohibition, because the Supreme Court of Texas was by the State Constitution and statutes given *appellate* jurisdiction only in cases where the appeal was from judgments in which the Courts of Civil Appeals themselves exercised *appellate* jurisdiction as distinguished from original jurisdiction. Since the issuance of the writ of prohibition was an *original* proceeding and not an *appellate* proceeding in that Court, then by the express terms of both the State Constitution and statutes the Supreme Court of Texas was deprived of *appellate* jurisdiction over that matter, one statutory provision being explicitly to the effect that the proceeding was final in the Court of Civil Appeals.

The case of *Edgar vs. Stanolind Oil Co., et al,* 90 S. W. (2d) 656, in which Edgar's first application for writ of error was refused by the Supreme Court of Texas, and the second case of the same style, 98 S.W. (2d) 222, in which Edgar's second application No. 22410 for writ of error was also refused by the Supreme Court of Texas, presents but a logical corollary of the ruling in the *City of Palestine vs. City of Houston* litigation, *supra.* In the *Palestine-Houston* case it

was simply held that the Supreme Court of Texas had no *appellate* jurisdiction where the Court of Civil Appeals had *issued* a writ of prohibition; and the *Edgar-Stanolind* case makes a similar holding where the Court of Civil Appeals has *refused to issue* a writ of prohibition.

We respectfully submit, as before, that the motion to dismiss should be sustained.

WILLIAM MCCRAW,
Attorney General of Texas

ALFRED M. SCOTT,
Assistant Attorney General

EDWARD H. LANGE,
Laredo, Texas

Attorneys for Appellees,
State of Texas, et al.